71-987

NO. A—662

In the Supreme Court of the United States

OCTOBER TERM, 1971

AUSTIN RANDALL MOODY

v.

THELMA RUTH MOODY

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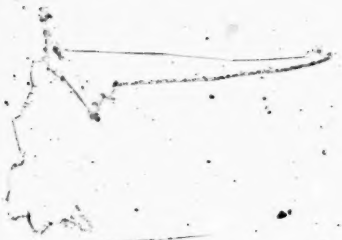

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. A-662

AUSTIN RANDALL MOODY, Petitioner

v.

THELMA RUTH MOODY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

The Petitioner, AUSTIN RANDALL MOODY, Petitions for a Writ of Certiorari to review the Judgment of the Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas, which Judgment was affirmed by the Supreme Court of Texas

OPINIONS BELOW

The Opinion of the court of appeals (App. A, *infra*, pp. 17-24) is reported at 465 SW, 2d 836; Motion for rehearing and order overruling same, April 8, 1971 (App. B, infra, pp. 25—31). The Judgment of the district court (App. C, *infra*, pp. 33—35). The Judgment of the Supreme Court of Texas denying Petitioner's Application for Writ of Error and denying his motion for rehearing (App. D, *infra*, pp. 37-38). Order Supreme Court of the United States, extending time to file Petition for Writ of Certiorari (App. E, *infra*, pp. 39-).

JURISDICTION

The judgment of the Court of Appeals was entered March 18, 1971, (app. A. *infra*, pp. 17). A timely Application for Rehearing was denied April 8, 1971, (App. B, *infra*, pp. 25). An application for Writ of Error was timely filed in the Supreme Court of Texas, May 12, 1971, and was denied on July 21, 1971. Petitioner's Application for Rehearing was denied, October 6, 1971, (Apps. C & D, *infra*, pp. 33,37). Petitioner filed his Notice of Appeal, to the Supreme Court, December 4, 1971. On January 3, 1972, Justice Potter Stewart, extended the time for filing a Petition for Certiorari to and including February 3, 1972 (App. E. pp. 39). The Jurisdiction of this Court is invoked under 28 U.S.C., 1254 (1).

QUESTIONS PRESENTED

For brevity, the assignments of error are consolidated as follows:

1. Whether the holding of the court of appeals is erroneous, contrary to public policy, and is contrary to all previous decisions in Texas, as alimony after divorce is so completely foreign to the law in Texas, that the Texas Courts have not, heretofore, enforced it under the Full Faith and Credit Clause of the Constitution of the United States.

2. Whether the court of appeals erroneously held the Nevada Divorce to be valid, irrespective of the fraud on the Court, as the parties were not

truly domiciled in Nevada, as such holding, forces the State of Texas to negate and subjugate its laws, to the authority of another State.

3. Whether the court of appeals erroneously held that the Certified Marriage Certificate, was not admissible as evidence.

4. Whether the court of appeals also ignored the fraud in the admission, over objection, of Respondent's Exhibits 4&5, and the fraudulent conspiracy of counsels for Respondent, when one of her attorneys, under Oath, falsely testified concerning the Mexican Marriage, declaring same to be forgery.

5. Whether the Court of Civil Appeals erred in failing to reverse the Trial Courts refusal to allow Petitioner to introduce competent testimony to prove that Respondent had entered into a "common law marriage", which if introduced and proved would have negated Respondent's right to alimony payments, and whether such refusal by the Court of Civil Appeals, constituted a denial of Petitioner's Rights to due process of Law.

6. Whether the Full Faith and Credit Clause of the United States Constitution should not be construed to eliminate the jurisdiction of Texas Courts, by compelling the Texas Courts to adhere to the decisions of sister states when same are in conflict.

LAW RELIED UPON

The Constitution of the United States and the Amendments thereto, The Constitution of the State of Texas, Statutes and case law.

STATEMENT

Respondent predicated her Cause of Action on a purported Nevada Divorce, dated June 6, 1963, awarding her alimony until her death or remarriage. A detailed statement is as follows:

The Petitioner, a Doctor of Medicine, (M.D.), and Respondent, his wife, were domiciled in Mason County, Texas, S.F., P—34, L—6—7), where both appeared with their respective attorneys and participated in a Cause of Action for Divorce in the 38th Judicial District Court, Mason County, Texas, (S.F., P—36,L—21,P—37,L—5-9,P—38,L—12—14). Orders were entered pending final adjudication, and such Orders were adhered to by both parties. While this cause was still pending in Texas, and both parties were complying with the Orders of the Court, Petitioner, went to Nevada and filed for a Divorce, in which case no action was taken, as neither Citation nor Notice was served on Respondent. Petitioner did not obtain a license to practice medicine in the State of Nevada, but did work in a hospital on a Government Indian Reservation, (S.F., P—141).

Respondent followed Petitioner to Nevada and filed a Counter-Claim for a Divorce, which was granted her, June 6, 1963, awarding her Alimony against Petitioner until her death or remarriage.

Both Petitioner and Respondent, immediately returned to Texas, where Petitioner resumed the practice of medicine, (S.F.,37,L—7 thru 20, and P—141,L—14, thru 16).

Petitioner, DR. MOODY, alleged, in his First Supplemental Answer, in this cause, that he had a conversation, with HARRY MARKLE, in the early summer of 1963, shortly after the Nevada Divorce, who stated to DR. MOODY, that he, HARRY MARKLE, intended to marry Respondent, THELMA RUTH MOODY, (Tr., P—64, Item No. 19, p—2, Pars. No. IV&VI), which allegations are supported by the undisputed testimony of THELMA RUTH MOODY, (S.F., P—28,L-19 thru L—25; P—29, L—1 thru L—16), and the testimony of, DR. MOODY, (P—142,L—19 thru 23,P—143, L—4 thru L—13), which evidence, in the Trial was further supported by the Certified Marriage Certificate of THELMA RUTH MOODY, to HARRY MARKLE, dated October 19, 1963, introduced in evidence, and identified as Plaintiff's Exhibit No. 12 and the translation is Exhibit No. 11, (S.F., P—228&228); a copy of the Marriage Certificate was attached to Petitioner's First Supplemental Answer, (TR. P—63, Item No. 19, Exhibit "A" attached thereto and made a part thereof), which Pleading was filed June 2, 1969, thereby giving Respondent approximately six (6) months to disprove such marriage, which he did not, and could not do.

In 1967, Respondent, THELMA RUTH MOODY, brought a Cause of Action, against Peti-

tioner, DR. MOODY, for arrearage in child support only, no allegation or reference to arrearage in alimony was made by Respondent. The case was filed and tried in the District Court, in Corpus Christi, Nueces County, Texas, and a Judgment was entered pertaining to arrearage in child support only, (S.F., P—15, L—9—25, P—148, L—5 thru 19).

On January 8, 1969, after HARRY MARKLE had remarried, Respondent filed this suit in Austin, Travis County, Texas, for arrearage in Alimony, as well as future Alimony based upon her life expectancy. (Tr. Item No. 1, P—2&3). Petitioner filed a Plea of Privilege (Tr. Item No. 2, P—4&5), and the case was transferred to Corpus Christi, Nueces County, Texas, (Tr. Item No. 4, P—7).

In Nueces County, Texas, the case was tried before a Jury. Petitioner contended that Respondent had remarried, October 19, 1963, in the State of Nuevo Leon, in the Republic of Mexico, and in the alternative, that Respondent had effected a "common law marriage", but Respondent denied this, (Tr., Item No. 17, P—9, Par. X). The Jury answered all issues favorable to Respondent, and the Trial Court entered Judgment for $23,925.51, for the alleged Alimony arrearage. Petitioner perfected his Appeal to the Court of Civil Appeals, for the Thirteenth Supreme Judicial District of Texas, at Corpus Christi, Texas. The Court of Civil Appeals affirmed the Action of the Trial Court. The opinion of the Court of Civil Appeals contains a generally correct statement of the case, and of the facts involved except Petitioner did not rely upon the fact that DR. MOODY,

did not abandon his license to practice medicine in Texas, but the correct facts are that the Petitioner, DR. MOODY, did not obtain a license to practice medicine in the State of Nevada.

REASON FOR GRANTING THE WRIT

1. This case presents an important question to the Administration of Justice in the Courts in the State of Texas and the United States, involving litigants domiciled in the State of Texas, who go to another State, obtain a Divorce, in order to receive alimony after Judgment of Divorce, and return to Texas, as such alimony, is contrary to the law in Texas and public policy. For more than one-hundred (100) years, in fact, since Texas gained its independence from Mexico and became a State, in the United States, the Courts in Texas have not granted alimony, after Divorce, on a Judgment in a sister state or foreign country, under the Full Faith and Credit Clause of the Constitution of the United States. The holding of the Court of Appeals is erroneous, contrary to public policy, and is contrary to all previous decisions in Texas.

The Court of Appeals failed to consider the undisputed evidence of both DR. MOODY and THELMA RUTH MOODY, both of whom testified they were participating in a Divorce proceeding in Mason County, Texas, before, during, and at the time of, the Nevada Divorce, June 6, 1963. Both DR. MOODY and MRS. MOODY, went to the State of Nevada for the sole purpose of obtaining a Divorce from each other, with the obvious, full intent of both of them returning to the State

of Texas; which both of them immediately did after the Judgment of Divorce in Nevada.

The Rule announced in the decision below, is a sweeping one that is destined to have a substantial impact upon the large number of divorce cases that are filed yearly in the State of Texas, as follows:

1955, divorce cases filed, 52,867.
1956, divorce cases filed, 60,361.

(an increase of 14.2%).

1967, divorce cases filed, 65,273.
1968, divorce cases filed, 71,304.
1969, divorce cases filed, 77,666.
1970, divorce cases filed, 81,442.

Of the cases filed in Texas 49% are divorce cases, and of those divorce cases filed 75% are filed by women. The data for 1971, has not been compiled. The decision of the Court of Appeals is destined to have a drastic and unsettling effect on divorces and the divorce law in the State of Texas, if allowed to stand, opening a mecca to women.

Thus, the decisions below not only will govern the large number of divorce cases that arise in the State of Texas, but is virtually certain to cause a large percentage of the women filing for a Divorce or anticipating filing for Divorce, in the State of Texas, to go to another state, where alimony is granted, and there file a divorce suit, obtain a Judgment, awarding her alimony, then return to domicile in Texas, where same would be enforced under the ruling of the appellate court in this cause of action. Such a situation would create

serious problems for the Courts in the State of Texas and sister states, and would create serious social problems in this State. A decision as the one at Bar announcing a new policy, which is contrary to all previous decisions and to public policy in the past, has such a far-reaching impact upon the operation of the Courts and Judiciary of the State of Texas, as to warrant close review by this Court. The following cases are cited: Carr v. Carr, 279 S.W. 2nd 146; McBride v. McBride, 265 S.W. 2nd 250; and Williams v. North Carolina, 289 U.S. 553,317 U.S. 287, and 325 U.S. 226.

2. The court of appeals, further erroneously held that DR. MOODY (M.D.), did not abandon his license to practice medicine in the State of Texas, which holding is not in keeping with the facts, when the facts are, that DR. MOODY, did not obtain a license to practice medicine in the State of Nevada.

The Court of Appeals, in its ruling, failed to consider the undisputed evidence that both DR. and MRS. MOODY, participated in a divorce proceeding in Mason County, Texas, before and during the Nevada Divorce Action. There is no evidence to show that either DR. MOODY or MRS. MOODY, intended to make the State of Nevada their permanent domicile, as is required by an overwhelming number of decisions.

3. The Court of Appeals, in its holding that the Marriage Certificate of THELMA RUTH MOODY, and HARRY MARKLE, "was not an original record nor an official publication", is in direct conflict with the long standing, "Comity of Nations", (i.e., the Republic of Mexico & the

United States of America), which countries have readily accepted and honored marriages in other countries and in the different states of the two countries. There are a number of recent decisions by other courts of appeal in the State of Texas honoring and upholding Civil Marriages in Mexico, where both parties are eligible for marriage under the laws of the country or State in which they are married. Such cases hold that the Civil Marriage Certificate is evidence of such marriage. The case at Bar wholly and completely disregards the previous decisions of other courts of appeal in the State of Texas, relevant to Civil Marriages in Mexico, evidenced by, the Marriage Certificate, Exhibit No. 12, and the translation thereof, Exhibit No. 11, which shows that the Certificate of Marriage was signed in ink by the Judge performing the ceremony, as was the Certificate of Authenticity affixed thereto. Such signature of the Judge in effect made said marriage certificate an original, for all purposes concerning the persons who were married. Nevarez v. Bailon, 287 S.W. 2nd 521, reh den err ref.

The denial of such marriage by THELMA RUTH MOODY, is true to her character as she is a mental patient, having had as many as fifteen (15) shock treatments in one (1) month, (Tr. Item No. 8). The Trial Court, upon Motion in Limine stopped Petitioner from inquiring into her long history of insanity and her treatment in mental institutions, as is evidenced by (Tr, P—122—123, Item No. 25&26, P—109; Items No. 5, 6, & 8) showing the long history of incurable insanity of THELMA RUTH MOODY, which evidence, the Jury was not permitted to have knowledge of,

depriving them from properly evaluating her testimony.

The holding of the Court of Appeals with reference to said Marriage Certificate, Exhibit No. 12 and No. 11, and application of Article 3731a, Sec. 4, T.A.C.S., was inconsistent in its holding as the Court of Appeals did not apply Art. 3731a, T.A.C.S., to the letter and the false translation of same, which were not only inadmissible as evidence, but the translation of which was false and damaging, (S.F., P—36, L—20, P—222&223, Exs. 4&5.

4. The basic error of the Court of Appeals, was its failure to recognize that a fraud was perpetrated on the Court, in the Nevada Divorce. Further fraud in the Trial of this Cause on the Merits, in the Trial Court, was the admission of inadmissible evidence, a letter in Spanish, not addressed to anyone nor signed by anyone identified to the Court and the admission into evidence of a false translation of such inadmissible evidence over objection to discredit the marriage of THELMA RUTH MOODY and HARRY MARKLE, (S.F., Exs. 4&5, P—222—223; and S.F., M.N.T., Exs. 5&6, P—62 and P—63).

The Court of Appeals has failed to recognize the fraud perpetrated on the Trial Court and the Court of Appeals by the Attorneys for THELMA RUTH MOODY, who frantically, in an effort to negate and nullify the authentic Marriage Certificate of THELMA RUTH MOODY, to one HARRY MARKLE, and to poison the minds of

the Jury against the Petitioner, DR. MOODY, when as rebuttal testimony immediately before the case went to the jury, one of the attorneys, Thomas Black, took the witness stand under oath, and was interrogated by Lee Mahoney, and Black testified falsely, stating that the Judge was in jail, who performed the ceremony and signed the Marriage Certificate, when THELMA RUTH MOODY and HARRY MARKLE were married, in Mexico, October 19, 1963, only four and one-half (4½) months after the Nevada Divorce, and by such perjury perpetrated a fraud on the Court, which fraud is undeniable and has not been denied by the parties, as is evidenced by, (S.F., P—182, L—18 thru 187, L—14); such testimony was unmistakably shown to be false and perjurious by Exhibits 1, 2, 3, & 4, authenticated by the United States Consul in Petitioner's Motion for a New Trial, P-58 thru 61.

The proper inquiry, as to the creditability of evidence, is whether the evidence upon which this particular decision rests, is probative and reliable, not whether it is to be labeled "hearsay", or "direct", as the hearsay rule, is not determinative since the probative value of both hearsay and non-hearsay evidence varies widely. In the case before the Court the evidence of Thomas Black, adduced by his co-counsel, Mahoney, was neither hearsay nor direct, but was strictly false and perjurious and had a devastating effect on the decision, both in the trial court and the court of appeals, which fraud was wholly and completely

disregarded by the Court of Appeals, In such cases, it has been held that such perjury and fraud on the Court, poses a threat to the entire Judicial system of our country, if permitted to go unnoticed, and unpunished and allowed to stand. Perhaps, the Court below, failed to recognize the gravity of the fraud of two (2) overzealous lawyers who wished to win.

5. The Court of Appeals erred in failing to reverse the trial courts refusal to allow Petitioner to introduce testimony and prove that Respondent, THELMA RUTH MOODY, entered into a "common law marriage" with one HARRY MARKLE, which if introduced and proved would have negated Respondent's right, if any, to alimony payments, as "common law marriages" are recognized in Texas, and whether such refusal by the court of civil appeals constituted a denial of Petitioner's right to due process of law, (S.F., P—28, L—9 thru 12; and P—153, L—20 thru 154, L—16).

6. The court of appeals erred in affirming the Judgment of the trial court which in effect limits the jurisdiction of decisions of sister States, when same are in conflict and as in the State of Nevada, a Judgment, by Nevada Statute, is not subject to modification, is absolute and is irrevocable and denies Petitioner his rights to due process of law, equal protection under the law under the Constitution of the United States. That the Statute of Nevada is unconstitutional.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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PROOF OF SERVICE

I, BENJAMIN D. LUCAS, licensed to practice in the Supreme Court of the United States, attorney of record, for AUSTIN RANDALL MOODY, Petitioner herein, deposes and says that on the 2nd day of February, 1972, that he served a copy of the foregoing Petition for Writ of Certiorari, to the Supreme Court of the United States, on THELMA RUTH MOODY, Respondent herein, by mailing a copy thereof in a duly addressed envelope with first class postage prepaid, to THOMAS BLACK, Counsel of Record for said Appellee, Capital Bank Building, Austin, Texas, by CERTI-

FIED MAIL, RETURN RECEIPT REQUESTED NUMBER, No. 361802.

THE STATE OF TEXAS)
)
THE COUNTY OF BEXAR)

Subscribed and Sworn to by BENJAMIN D. LUCAS, this 1st day of February 1972.

NOTARY PUBLIC in and for
Bexar County, Texas

APPENDIX A

NUMBER 552

In the Court of Civil Appeals
For the Thirteenth Supreme Judicial District of Texas

Sitting at Corpus Christi, Texas

Austin Randall Moody, Appellant
v.
Thelma Ruth Moody, Appellee

ON APPEAL FROM THE 94TH DISTRICT COURT OF NUECES COUNTY, TEXAS

OPINION

This is a suit to enforce the judgment of the district court of the State of Nevada which awarded Thelma Ruth Moody, appellee, monthly alimony. The Nevada decree provided that the appellant was to pay appellee $50.00 per month during the months of June through November of 1963 and thereafter $300.00 per month until her death or remarriage. The appellant's basic defense was that appellee had remarried. The case was tried before a jury which found that appellee had not remarried. The trial court entered judgment for 68 accrued and unpaid alimony payments with interest on each payment from the time it accrued for the total amount of $24,225.51 less an offset

in the amount of $300.00 which the jury found in favor of the defendant.

The appellant's only evidence of appellee's remarriage was a copy of a Mexican marriage certificate. The English translation of the instrument shows that the only certification of the document was as follows:

> "This is a true and correct copy taken from the original which I certify and expedite at the request of interested party in Columbia, Nuevo Leon, on the 19th day of October, 1963.
>
> OFFICIAL OF THE CIVIL REGISTRY.
>
> /s/ B. Esparza
> Prof. Baltezar Esparza Guerra
> (Seal of the Court of Civil Registry
> Columbia, Nuevo Leon)"

The appellee objected to the introduction of this instrument on the basis that it was hearsay evidence, and because the instrument did not comply with the statutory method of authentication of foreign official documents under Article 3731a, V.A.C.S.

This article provides in part that any written instrument which is permitted by law to be made, filed, kept or recorded by an officer or clerk of another nation, shall, so far as relevant, be admitted in the courts of this State as evidence of the

matter stated therein, provided the party offering it has delivered a copy thereof to the adverse party a reasonable time before trial. Sec. 4 of this statute states that:

> "Such writings may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy. Except in the case of a copy of an official writing from a public office of this State or a subdivision thereof, the attestation shall be accompanied with a certificate that the attesting officer has the legal custody of such writing. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States, or by any officer of a United States military government, stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office . . . ." (Emphasis supplied.)

It is undisputed that the instrument in question was not an original record or an official publication. The certification on the instrument only states that it is a true and correct copy taken from the original. It does not say it is a copy of the original of what. It does not state where it is on file, who filed it or who has legal custody of the original record. This statute which permits official written instruments to be admitted into evidence, provides that the copy of such instrument may be attested by the officer having the legal custody of the record, or by his deputy. The attestation shall however be accompanied with a certificate that the attesting officer has the legal custody of such writing. If the office in which the original record is kept is in a foreign country, the certificate may be made by any of the officers named in the statute (See Sec. 4, portion emphasized) provided it was authenticated by the seal of his office. These requirements were not met. We hold that such instrument as offered, was inadmissible as evidence of the proof of the marriage.

Antonio Abarca, an official court interpreter, was qualified by the appellant as an expert on Mexican marriage certificates. He testified on cross-examination that any person could have gone to Columbia, Mexico on the date stated and could have used the names of Harry Markel (the person appellee is alleged to have married) and Thelma Ruth Moody as assumed names. He testified that such a person could have obtained the document in question for $50.00 to $100.00.

The appellee testified that she did not marry Harry Markel the person named in the instrument; had never been to Columbia, Nuevo Leon, Mexico; that the last time sha had been in Mexico at all, was 18 years ago; that she had never heard of Professor Baltezar Esparza Guerra; that from the interpretation of the document it did not list her parents' names correctly, nor did it list her residence correctly. She stated that she had no idea how the document in question came into existence.

Harry Markel testified that he had never been to the town of Columbia, Mexico; that he was not in Mexico on that date but was in Austin, Texas; that he had never heard of the Mexican citizens named in the document; that the information contained in the document was incorrect in numerous respects concerning the name of his mother, his age, and the spelling of his name. Finally he testified that he had not on that date, or any time, entered into a marriage ceremony with Thelma Ruth Moody. There was ample evidence to support the jury's finding that Harry Markel and appellee had not married.

The purpose of the authentication statute is to give credence to official documents so that the same may have value as competent evidence and may be relied upon. See 23 Tex. Jur. 2d, No. 295, p. 433, Evidence. Appellant's instrument lacked these qualities. One of the purposes of the statute is to prevent fraud and a miscarriage of justice.

Appellant in a number of points of error attempts to make a collateral attack on the final judgment of divorce from Nevada. The properly authenticated Nevada judgment was introduced into evidence. It clearly shows that it was valid on its face. The main thrust of appellant's contention that the judgment is void was based on the fact that neither the appellant nor appellee had complied with the domiciliary requirements in Nevada to entitle the Nevada court to exercise jurisdiction over the parties. He relies upon the fact that he had not given up his medical license in Texas. He stated that he had continually maintained his residence in Texas, although he lived and worked in Nevada for more than the statutory period to obtain residency there. The record shows that the appellant was the original plaintiff in the Nevada divorce suit. The pleadings attached to the Nevada decree, show that he alleged that he was a bona fide resident of Clark County, Nevada. He swore that the facts contained in the pleadings were true and correct. The appellee filed a cross-action to the divorce suit and the court granted appellee a divorce on the cross-action.

If one of the parties participated in a divorce suit, without objecting to the jurisdiction of the court; he may not thereafter assail the decree in a collateral proceeding on the theory that one or more of the parties were non-residents. 34 Tex. Jur. 2d § 260, p. 173, Judgments. See 27B C.J.S. § 343, Divorce, p. 811; § 354 and § 357. We hold that the Nevada decree is not void

and was not subject to a collateral attack by appellant.

Appellant argues that since Texas does not permit alimony after a divorce, the Nevada judgment should not be entitled to full faith and credit in this jurisdiction. This point is without merit. A valid foreign judgment was rendered. The payments became vested on becoming due. If the court which rendered the judgment had jurisdiction of the parties and the subject matter, then as to such accrued payments, the judgment shall be protected and will be given effect and full faith and credit in our courts. *Stout v. Stout*, 214 S.W. 2d 891 (Tex. Civ. App.—Texarkana 1948, writ ref.); *Gard v. Gard*, 241 S.W. 2d 618 (Tex. Sup. 1951); 27B C.J.S. § 373, Divorce, p. 863 and § 328, p. 787, Divorce.

We have considered all of appellant's points of error and they are overruled.

Judgment of the trial court is affirmed.

PAUL W. NYE
Chief Justice

Opinion delivered and
filed this the 18th
day of March, 1971.

NUMBER 552

In the Court of Civil Appeals
For the Thirteenth Supreme Judicial District of Texas

Sitting at Corpus Christi, Texas

Austin Randall Moody, Appellant
v.
Thelma Ruth Moody, Appellee

ON APPEAL FROM THE 94TH DISTRICT COURT OF NUECES COUNTY, TEXAS

CONCURRING OPINION OF
ASSOCIATE JUSTICE T. GILBERT SHARPE

I concur in the result.

T. GILBERT SHARPE
Associate Justice

Concurring opinion
delivered and filed
this the 18th day
of March, 1971.

Filed in Court
of Civil Appeals
Corpus Christi
Apr. 2, 1971

APPENDIX B

NUMBER 552

OVERRULED
APRIL 8, 1971

In the Court of Civil Appeals
For the Thirteenth Supreme Judicial District of Texas

Sitting at Corpus Christi, Texas

Austin Randall Moody, Appellant
v.
Thelma Ruth Moody, Appellee

ON APPEAL FROM THE 94TH DISTRICT COURT OF NUECES COUNTY, TEXAS

MOTION FOR REHEARING

TO THE SAID HONORABLE
COURT OF APPEALS:

Now comes the Appellant in the above numbered and entitled cause, and respectfully moves the Court to set aside the Judgment heretofore rendered in this Court on the 18th day of March, 1971, affirming the Judgment of the Court below, and to grant a rehearing and reverse said Judgment of the Court below, good cause appearing, as follows:

I.

The Court of Civil Appeals erred in holding that Appellant, — "** relied upon the fact that he had not given up his Medical License in Texas"., as such is not the position of the Appellant. In Appellant's Brief; the position of the Appellant was and is that Appellant was licensed in Texas, went to Nevada, but did not see fit to obtain a License to practice Medicine in Nevada, which failure to obtain license in Nevada, is prima facie evidence of the fact that at no time did Appellant intend to remain in Nevada and establish his domicile there. (Page 4, paragraph 2, lines 8 & 9, of the opinion, and pages 141, & 142, S.F.)

II.

The Court of Civil Appeals erred in assuming in the light of the testimony of both the Appellant and Appellee, that the Nevada Court, had Jurisdiction of the parties, and the subject matter, as it appears from the language in the opinion of the Appellate Court, page 5, lines 5 & 6, that there was some doubt in the minds of the Appellate Court, from the language of the Court, which is quoted verbatim, "If the Court which rendered the Judgment had Jurisdiction of the Parties and the subject matter".

III.

The Court of Civil Appeals erred in disregarding and ignoring Appellant's twenty-sixth (26th) Point of Error, which was that a cause of action for

Divorce was pending in The District Court of Mason County, Texas, in which cause both Appellant, and Appellee, had appeared in person, and with their respective Attorneys, and in obedience to the temporary ORDER of said Court, Appellant was paying child support. Said cause was filed prior to the Nevada cause, and had not been finally adjudicated, nor had said cause been dismissed, when the Nevada Divorce was granted. The true domicile of the parties was Mason County, Texas, as of the time the Nevada Divorce was granted, June 6, 1963.

IV.

The Court of Civil Appeals erred in holding that the Marriage Certificate between Appellee; THELMA RUTH MOODY, and, HARRY L. MARKEL, JR., was inadmissible, as the undisputed transcript of record shows that the original signed Marriage Certificate with the Certification affixed thereto, was introduced in evidence of support of Appellant's Motion for Summary Judgment, and Counsel for Plaintiff, Appellee herein was furnished with a true copy of same, and allowed to examine the original, which was heard in September, 1969, with leave of the Court, the original signed certificate was withdrawn, and a true copy filed as of record in lieu thereof. At the Trial of this cause, in November, 1969, the original Marriage Certificate was again introduced into evidence, and remained with the Court Reporter, several weeks, until withdrawn with leave of the Court, and a copy filed as of record in this cause,

in lieu of the original, marked for identification at the Trial as Plaintiff's Exhibit Number "12", and the translation of same, as Plaintiff's Exhibit Number "11".

V.

The Court of Civil Appeals erred in failing to consider Appellant's objection to Appellees', Plaintiffs below, Exhibit Number "4", introduced by Appellee, and set out in Appellant's points of error, one (1) through nine (9), as the introduction of said document is inadmissible, and was prejudicial to a fair and impartial Trial for the Defendant, of which he is entitled under the Constitution of the State of Texas, and The Constitution of The United States.

VI.

The Court of Civil Appeals erred in failing to consider and in failing to take into account the damage, and prejudice of the false testimony of Witness, THOMAS BLACK, (S.F. 182-206), the testimony of, THOMAS BLACK, being repudiated without contradiction, in Appellant's Bill of Exception at Defendant's, Appellant herein, Hearing on his Motion for a New Trial, as is set out in the Statement of Facts, and Exhibits of Defendant are numbered 1, 2, 3, 4, 5, and 6, clearly showing that such evidence was false and prejudicial to Defendant, Appellant herein, and that, same, deprived Appellant of a fair and impartial Trial.

VII.

The Court of Civil Appeals erred in ignoring and failing to consider Appellant's Thirteenth (13th) point of error, as the Jury should have been given an opportunity to know about the mental instability of the Appellee, Plaintiff below, and thereby give the Jury a fair and impartial opportunity to evaluate the credibility, if any, of Appellee's Testimony.

VIII.

The Court of Civil Appeals erred in failing to consider Appellant's Fifteenth (15th) point of error.

IX.

The Court of Civil Appeals erred in ignoring and failing to consider Appellant's Sixteenth (16th) point of error.

X.

The Court of Civil Appeals erred in denying and failing to consider Appellant's Seventeenth (17th) point of error.

XI.

The Court of Civil Appeals erred in failing to consider Appellant's Eighteenth (18th) and Nineteenth (19th), points of error, as the admission in evidence, over objection of Defendant, of the Pleadings which had been severed from this cause

of action, was prejudicial to Defendant, and which had been to a fair and impartial Trial for the Defendant, Appellant, herein.

XII.

The Court of Civil Appeals erred in failing to consider Appellant's Objection to hearsay testimony and to the comments of the Trial Court on same, as is set out in Appellate's Twentieth (20th), Twenty-first (21st), Twenty-second (22nd), and Twenty-third (23rd), points of error, as same is prejudicial to Defendant, Appellant herein, obtaining a fair and impartial Trial.

XIII.

The Court of Civil Appeals erred in failing to consider the errors of the Trial Court as set out in Appellant's Points of Error, Twenty-eight (28), Twenty-nine (29), and Thirty (30).

WHEREFORE, Appellant respectfully prays that this Motion be granted, and that the Judgment affirming the cause heretofore rendered herein be set aside and the Judgment of the Court below be in all things reversed.

BENJAMIN D. LUCAS
Attorney for Appellant
2500 Tower Life Building
San Antonio, Texas 78205

CERTIFICATE

A copy hereof was mailed to THOMAS BLACK, Capital National Bank Building, Austin, Texas, Attorney for Appellee, on the 31st day of March, 1971, by CERTIFIED MAIL, RETURN RECEIPT REQUESTED NUMBER 109182.

_____

APPENDIX "C"

NO. 99779-C

IN THE DISTRICT COURT
NUECES COUNTY, TEXAS
94th JUDICIAL DISTRICT

THELMA RUTH MOODY
v.
AUSTIN RANDALL MOODY

FINAL JUDGMENT

On the 12th day of November, 1969, came on to be heard the above entitled and numbered cause wherein Thelma Ruth Moody Wade, joined pro forma by her husband, John S. Wade, is plaintiff and Austin Randall Moody, of Port Aransas, Nueces County, Texas, is defendant, and came the plaintiff and announced ready for trial, and came the defendant and announced ready for trial, and thereupon, a jury having been demanded, came a jury of twelve good and lawful men and women, to-wit, K. K. Jones and eleven others, who being duly impaneled and sworn, constituted the jury in this cause; and the jury having heard the pleadings and the evidence and all parties having closed on November 13, 1969, the Court prepared its charge, and on November 13, 1969, charged the jury as required by law and submitted special issues to the jury, and, after having heard the argument of counsel thereon and having retired to consider their verdict and answers to

the special issues, the jury duly returned into open court on November 13, 1969, their verdict and answers to the special issues as follows:

Special Issue No. 1: "She was not."

Special Issue No. 2: "He did."

Special Issue No. 3: "They were."

The Court having found that the answers in said verdict are each in proper form and that said verdict should be received and filed, on the 13th day of November, 1969, it was ORDERED by the court that said verdict be received as the verdict in this cause and that same be filed herein; and thereafter came the plaintiff and filed her motion for judgment and the Court being of the opinion that under the pleadings, the law, the evidence and the answer of the jury to Special Issue No. 1, the plaintiff is entitled to recover from the defendant sixty-eight (68) accrued, but unpaid, alimony payments in the amount of $300.00 each, totaling $20,400.00 together with interest at the rate of 6% per annum of each $300.00 payment from the time that it accrued, which interest the Court finds to be in the amount of $3,825.51, totaling $24,225.51, to which finding of the Court the defendant duly and in open court excepted, and the Court having further found and being of the opinion that under the pleadings, the law, the evidence, and the answers to Special Issues Nos. 2 and 3, the defendant is entitled to an offset in the amount of $300.00, to which action of the Court the plaintiff duly and in open court excepted,

It is therefore ORDERED, ADJUDGED and DECREED by the Court that the plaintiff, Thelma Ruth Moody Wade, do have and recover from the defendant, Austin Randall Moody, the sum of $23,925.51 together with interest thereon at the rate of 6% per annum from August 1, 1969, until paid, together with all costs of suit, to which action of the Court the defendant duly and in open court excepted.

Signed, rendered and entered this _____ day of November, 1969.

_____

Judge Presiding, 94th District
Court of Nueces County,
Texas

APPENDIX D

IN THE SUPREME COURT OF TEXAS

July 21, 1971

NO. B-2724

From Nueces County, Thirteenth District

AUSTIN RANDALL MOODY

v.

THELMA RUTH MOODY

Application of petitioner for writ of error to the Court of Civil Appeals for the Thirteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Austin Randall Moody, and surety, Fidelity & Deposit Company of Maryland, pay all costs incurred on this application.

October 6, 1971

NO. B-2724

From Nueces County, Thirteenth District

AUSTIN RANDALL MOODY

v.

THELMA RUTH MOODY

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 3rd day of December, 1971.

GARSON R. JACKSON, Clerk

By _____, Deputy,
Eugene Cervenka

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-662

October Term, 1971

Austin Randall Moody, Petitioner

v.

Thelma Ruth Moody

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 3, 1972.

/s/ Potter Stewart

Associate Justice of the Supreme Court of the United States

Dated this 28th day of December, 1971